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mon carrier of passengers, does not relieve him of the duty of exercising ordinary care for his own safety.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1363-1366.]

3. Same—Contributory Negligence—Evidence.—In an action against a railroad for wrongfully causing the death of decedent, evidence that decedent was waiting at defendant's station for a train, was familiar with the locality and with the position of the tracks, knew that the train was approaching, had an unobstructed view thereof, and was struck while crossing the track to the opposite platform, and while walking with his head down and seemingly in a state of abstraction, showed contributory negligence on decedent's part.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1365.]

HOBACK *v.* COMMONWEALTH.

Jan, 18, 1906.

[52 S. E. 575.]

1. Jury—Venire Facias—Sufficiency.—Under Code 1904, p. 2114, § 4018, requiring the writ of venire facias, in case of a felony, to command the officer to summon 16 persons of his county or corporation from a list furnished him by the clerk issuing the writ, a venire facias directing the officer to summon persons from a list furnished him by the judge, instead of the clerk, was properly quashed.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 295.]

2. Same—Jury List.—Under Code 1904, p. 2114, § 4018, authorizing the judge to order more than 20 names to be drawn and placed in the jury list in a felony case, but providing that he shall in such cases specify the number of names to be drawn and the number of persons to be summoned, a letter from the judge directing the clerk to summon 30 first-class men for the first day of the term to serve as veniremen is insufficient to authorize the clerk to draw a list of that number.

3. Same—Venire Facias—Sufficiency.—Where a first venire facias was quashed, a second one commanding the officer to summon 16 persons from a list furnished by the judge, to which was attached a list of 16 names from among those summoned under the first writ, was insufficient, under Code 1904, p. 2114, § 4018, requiring the writ to command the officer to summon 16 persons from a list containing 20 names furnished by the clerk.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 295.]

4. Same—Second Writ—Statutory Provisions.—Code 1904, p. 2115, § 4019, providing that, when a sufficient number of jurors cannot be

had from those summoned and in attendance, the court may direct another venire facias, and cause to be summoned from the bystanders or from a list furnished by the judge, as many as may be necessary to complete the panel, does not apply where the first writ, issued under section 4018, has been quashed, but only gives authority to complete the panel after the return of a valid writ issued under section 4018.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 313.]

5. Same.—The provision of Code 1904, p. 2114, § 4018, that the names of jurors in felony cases shall be drawn and furnished by the clerk, and not selected by the judge, is mandatory, notwithstanding the further provision that no irregularity or error in drawing the names for the jury list or in summoning the persons named shall be ground for a new trial, unless objection was made before the jury was sworn, and the error was intentional or such as to probably cause injustice to the commonwealth or to the accused.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 307-309.]

6. Criminal Law—Appeal—Harmless Error—Selection of Jurors.—That the jurors selected and summoned under an invalid venire facias were from among those summoned under a previous writ which had been quashed does not render the error harmless.

JOHNSON *v.* COMMONWEALTH.

Jan. 25, 1906.

[52 S. E. 625.]

1. Criminal Law—Appeal—Review of Facts—Rule of Decision.—Under the express provisions of Code 1904, § 3484, where the evidence and not the facts are certified, the rule of decision in the appellate court in considering the evidence is the same as on a demurrer to the evidence.

2. Same—New Trial—Newly Discovered Evidence.—In order to entitle accused to a new trial on the ground of newly discovered evidence, the evidence must have been discovered since the trial. It must have been such that it could not have been discovered before the trial by the exercise of reasonable diligence. It must be material, and such as should produce an opposite result on the merits, and it must not be merely cumulative, corroborative, or collateral.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2306-2336.]

3. Same.—In a prosecution for rape, the evidence of identification was conflicting and unsatisfactory, and it was testified on the trial that detectives, while watching defendant in his house, saw him go to the fireplace and burn some clothes which looked like soiled under-